Herbert E. Gregory v. U.S. General Accounting Office

Docket No. 20-101-15-82

Date of Decision: November 12, 1985

Cite as: Gregory v. GAO (11/12/85)

Brown, Member - Dissenting Opinion

Summary Judgment

Management Rights

Discipline

Disparate Treatment

DISSENTING OPINION

The Supplemental Decision of the Presiding Member was issued on September 30, 1985, in which she found that Petitioner had not been the victim of disparate treatment and thus reaffirmed the Board's prior decision in favor of Respondent. The Presiding Member's supplemental decision became the final decision of the Board on November 1, 1985, when no motion to reopen and reconsider was filed by either party and when the Board failed to reconsider on its own motion. I dissent from the Board's failure to reconsider.

The decision of the Presiding Member, which became the decision of the Board, was constructed primarily upon the Petitioner's statement that he concurred with the GAO facts of the case. The majority contends that the factors pertinent to Mr. Gregory's suspension were dissimilar to the factors pertinent to the case of the other employee. The basis for this contention is that portion of the Agency Memorandum of Points and Authorities In Opposition to Petitioner's Motion to Reopen and Reconsider which states that the "records reveal that up to the moment of arrest there was apparent consent between the parties." By limiting the basis of its decision to only this portion of the Agency statement, the majority members exclude other portions of the Agency statement that are essential to their deliberations and that must be considered when the Petitioner's statement that he "concurred with the GAO facts of the case" is analyzed. If any one part of the Agency statement is essential in the interpretation of the Petitioner's statement, then the entire Agency statement must be considered in the same context. Some of the essential factors included in the Agency statement but improperly considered by the majority in its decision, are discussed in the following paragraphs.

On October 23, 1984, the other employee, whose situation forms the basis for comparison in this case, was arrested by the Fairfax County Police and charged with a violation of Section 18.2-29 of the Virginia Code-Solicitation to Commit a Felony. The felony which he allegedly solicited is oral sodomy and is cited by the Virginia Code as a "Crime Against Nature"--a class 6 felony. The Agency in its memorandum stated that the "records reveal that up to the moment of arrest there was apparent consent between the parties."

The majority membership of the Board, as apparent by its decision, accepted this statement as evidence and employed it as the prime basis of its decision. This acceptance is in error. The statement by the Agency is an opinion and is to be treated as such. The Merit Systems Protection Board, in the case Enos v. U.S. Postal Service, 7 MSPB 554 (1981), says that "statements made by an Agency in a letter arguing the Agency case on appeal before the presiding official do not constitute evidence of the truth of these statements."

In its Memorandum of Points and Authorities In Opposition to Petitioner's Motion to Reopen and Reconsider, the Agency states that at a preliminary hearing on December 18, 1984 in Fairfax County, General District Court, the other individual entered a plea of guilty to the crime of "Sexual Battery," a misdemeanor punishable by a maximum of one year of confinement and a $1,000 fine. Section 18.2-67.4 of the Virginia Code defines the term "sexual battery" as follows:

> "An accused shall be guilty of sexual battery if he or she sexually abuses the complaining witness against the will of the complaining witness, by force, threat, or intimidation, or through the use of the complaining witness's mental incapacity or physical helplessness."

The Agency stated in its Memorandum that the Court accepted this guilty plea. If the Board accepts Mr. Gregory's statement that he concurred with the GAO facts of the case, then it must be certain not to limit this concurrence to that portion of the statement that pertains to an "apparent consent between the parties." It must, rather, consider the Agency statement in its entirety, including the probability that even though the "consenting adult" allegation may have been apparent to the Agency, it was not so apparent to the Court, which accepted a plea of guilty by the other employee to the crime or sexual battery--a crime that involves force, threat or intimidation. To do so is incompatible with the evidence and represents a substitution of opinion for, and improper judgment of, this evidence as presented to the Board. To say (as the Agency did) that no "force or violence was suggested anywhere in the police records of the (other employee's) case" is a complete misrepresentation--one that actually disregards the records themselves.

The evidence indicates that the two situations are similar in that both (1) involved an off-duty sexual offense of a violent nature; (2) had an adverse effect on the efficiency and the effectiveness with which the primary individuals involved could perform in the work environment--generating a possible perceived threat of coercion, intimidation, and fear; and (3) required a high degree of public contact, the effectiveness of which was adversely affected by the nature of the crimes. The statement relative to "consenting adults" is conceived by the Agency as "apparent consent." The question is this: "Apparent to whom?" The evidence indicates that it was not apparent to the General District Court, which accepted a plea of "sexual battery," and certainly not to the employee who entered the plea. The statement, therefore, is in essence an Agency opinion that has no force of evidence. Why the employee confessed to the crime or entered his plea is not a factor of speculation for the Board. The Board is responsible for considering evidence and evidence only.

The evidence supports the Petitioner's contention of disparate treatment for similar situations in that the penalty of suspension without pay imposed upon Mr. Gregory differed markedly from that imposed upon the other employee, who received no suspension and no loss of pay. Additionally, consideration must be given to the fact that Mr. Gregory is a black male with no particular status. The other employee, by contrast, was a white male of supergrade status who had been employed in the agency for a considerable period of time. The Petitioner should have been awarded back pay for the period of his suspension.